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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

WEYERHAEUSER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Weyerhaeuser Company prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 23, 1960.

OPINIONS BELOW

The opinion of the court below is reported at 276 F. 2d 865 (*infra*, pp. 1a-21a). The decision and direction of election by the National Labor Relations Board in the representation proceeding are unreported (B.A. 91 *et*

seq.).[1] The Board's decision and order in the unfair labor practice proceedings are reported at 124 N.L.R.B. No. 9 (B.A. 11 *et seq.*).

JURISDICTION

The decree of the Court of Appeals was dated and was entered on May 23, 1960 (*infra*, p. 22a), pursuant to an opinion dated April 6, 1960, petition for rehearing denied May 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) and section 10 (e) of the National Labor Relations Act, as amended (29 U.S.C. sec. 160 (e)).

QUESTIONS PRESENTED

1. Whether a determination of an appropriate bargaining unit by the National Labor Relations Board was a proper administrative adjudication, inasmuch as the Board failed to make the necessary findings supporting the determination under existing Board standards and the Board also failed to disclose or explain any abandonment of those standards.

2. Whether existing Labor Board policy governing craft and departmental severance is arbitrary and discriminatory, inasmuch as craft severance is denied in four industries but facilitated in all others.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., sec. 151, *et seq.*) are set forth *infra*, pp 24a-27a.

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[1] The Board's printed appendix below, "Appendix to Petitioner's Brief", is hereafter designated "B.A." The employer's printed appendix below, "Brief and Appendix for Respondent", is hereafter designated "R.A."

STATEMENT

This petition has its genesis in a representation petition filed by a labor union known as the Amalgamated Lithographers of America, AFL-CIO, hereinafter called Lithographers.[2] The union requested certification as exclusive bargaining representative of all employees engaged in lithographic work at the employer's plant in Middlebury, Indiana (B.A. 77-78). In its representation petition, the Lithographers sought to sever such employees from an existing collective bargaining unit consisting of all hourly paid employees and represented exclusively by the United Papermakers and Paperworkers of America, AFL-CIO, hereinafter called Papermakers (B.A. 91, 81-82).

Both the employer, petitioner herein, and the Papermakers, intervenors in the representation proceeding, contended that a separate unit of the lithographic employees was inappropriate. The employer believed that the integrated nature of its production process should preclude the severance of a separate bargaining unit for this minority group. It further urged that the so-called lithographic employees did not meet the standards for craft or departmental severance established by the Board.

A brief explanation of the production process and of the unit sought is essential to a proper understanding of the issues in this case.

The employer's plant at Middlebury was built two years before the severance petition was filed and was designed especially for making folding boxes. The physical layout was planned for and resulted in an integrated, continuous flow of production (R.A. 3, 19, 26, 38, B.A. 28). The basic material, paperboard, comes into the plant at the time

[2] The Lithographers disaffiliated from the AFL-CIO subsequent to its petition.

required by the production schedule (R.A. 27-8, 38). Ordinarily the paperboard sheets are fed into one of five printing presses, which are lined up adjacent to each other in an area marked off by a yellow painted line on the floor (R.A. 6, 11). Occasionally the sheets are not put through any printing press (R.A. 8).

Four of the printing presses use the letterpress or direct printing process; the other is a five-color offset or lithographic press utilizing an indirect printing process (R.A. 5-6, 11, B.A. 70). The offset press turns out the same type and quality of printed boxes as do the letterpresses, although it can apply more colors on a single run than the smaller and older letterpresses (R.A. 13). The products of the presses are indistinguishable, at least to the eyes of a layman (R.A. 20).

After printing and after the ink is dry, the sheets are fed into one of six cutting and creasing presses (R.A. 5, 30). Here the sheets are cut down from stock size to box size and, at the same time, creases are impressed so that they will fold (R.A. 8, 12-13). After cutting, the waste is stripped off and some of the boxes are put through machines known as "gluers" (R.A. 8, 26). These fold the boxes flat and apply glue to the edges. Whether glued or not, the boxes are then packed up and shipped out in a flat or folded condition (R.A. 8).

All of these operations are performed in one large working area in which more than 100 hourly-paid employees are employeed, including the eighteen sought to be represented by the Lithographers. All hourly-paid employees enjoy precisely the same facilities and working hours (R.A. 4, 9, 22, 24). They use the same entrance, the same locker and washroom facilities, work in one large production area, and all printing employees eat on the job (R.A.

4, 23, B.A. 61). Seniority is plant-wide (R.A. 22, 27).

Since 1955, all of the employees had been represented by the Papermakers in a plant-wide unit (R.A. 46). Eighty-two per cent of the folding box plants in the mid-west area similarly include the lithographic workers in a single plant-wide unit (R.A. 49, 66). No reason was shown why the 18 employees at Middlebury had interests different from their fellow-workers. The record contains substantial evidence that these 18 employees were not craftsmen and had not received training as such, and that they formed a homogeneous group with the others.

Based to a considerable extent on the foregoing facts, the employer urged the inappropriateness of a separate lithographic unit. The Board determined otherwise, explaining its decision in a footnote finding (B.A. 92, n. 4):

> The employees sought by [Lithographers] are engaged in the operation of offset presses which use the traditional and customary lithographic processes. Although they have in some instances transferred to offset work from other parts of the plant there is not such regular and continuous interchange as would preclude their separate representation or dictate a combined letterpress and offset unit. Cf. Pacific Press, Inc., 66 NLRB 458. We find that these employees, may, therefore, constitute a separate appropriate unit, and that there is no such integration of [respondent's] operations as would preclude their separate representation. McCall Corporation, 118 NLRB 1332. As [Lithographers] is a union which traditionally represents such employees, we shall direct an election in the unit it seeks.

The Board directed a self-determination election, the outcome of which was to determine whether a plant-wide unit or the smaller lithographic unit was appropriate (B.A. 91). The election was won by the Lithographers, and the Regional Director thereupon certified the Lithographers as

the collective bargaining representative of the eighteen lithographic production workers. (B.A. 95).

In order to obtain a judicial review of the Board's unit determination, the employer refused to bargain with the certified union. The Board thereafter found, in an unfair practice proceeding, that the employer had violated sections 8 (a) (5) and 8 (a) (1) of the National Labor Relations Act by this refusal, and it ordered the employer to cease and desist from refusing to bargain with the Lithographers (B.A. 11).

The Board sought enforcement of its order in the Court of Appeals for the Seventh Circuit, pursuant to Sec. 10(e) of the National Labor Relations Act (29 U.S.C. Sec. 160(e)). Pursuant to Sec. 9(d) (29 U.S.C. Sec. 159(d)), the record and decision in the representation proceeding were part of the record in the enforcement proceeding. As before, the employer contended in the Court of Appeals that the integration of its production process should preclude craft or departmental severance and, alternatively, that the Board had failed to apply its existing standards for severance or to determine whether or not they had been met.

The Court of Appeals interpreted the Board's footnote decision in the representation proceeding as a determination by the Board that the petitioner's production process was in fact not integrated, and the court went on to hold, contrary to all Board doctrine, that the usual craft severance standards therefore did not apply. A petition for rehearing was denied, and on May 23, 1960, the court entered a decree enforcing the Board's order.

REASONS FOR GRANTING THE WRIT

1. **The decision of the National Labor Relations Board which determined the appropriate bargaining unit was so**

lacking in findings and elaboration that it failed to meet minimal administrative adjudicative standards and precluded effective judicial review. The Board failed to make the necessary findings to support its determination under existing Board standards governing craft or departmental severance, and did not disclose or explain any policy change in those standards.

Prior to 1954, the Board had ruled that severance of small units for collective bargaining purposes would not be permitted in industries where all employees were engaged together in achieving an integrated flow of production and where a plant-wide bargaining pattern existed. Originating in basic steel in 1948 (*National Tube Co.*, 76 NLRB 1199), the doctrine was progressively extended to wet milling (*Corn Products Refining Co.*, 80 NLRB 362), lumber (*Weyerhaeuser Timber Co.*, 87 NLRB 1076), and aluminum (*Permanente Metals Corp.*, 89 NLRB 804).

Craft severance is still denied by the Board in those four industries, but the Board reexamined and changed its severance policies for all other industries in *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954). Therein the Board set forth in detail its new requirements for craft severance, and we quote them at length because they were almost completely ignored by the Board in the case at bar (107 N.L.R.B. 1422-1424):

> . . . we find that the intent of Congress will best be effectuated by a finding, and we so find, that a craft group will be appropriate for severance purposes in cases where a true craft group is sought and where, in addition, the union seeking to represent it is one which traditionally represents that craft.
>
> • • •
>
> In adopting our new rule, we wish to make it clear that the requirement that the unit sought to be severed must be a true craft group will be rigidly enforced in

> cases where severance is sought on that basis. We propose to exercise great care in making certain that in the administration of this rule only groups exercising genuine craft skills will be embraced within the ambit of the rule, and that the requirements will not be relaxed over a period of time. . . .
>
> In our opinion a true craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and or helpers. To be a "journeyman craftsman" an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training. An excellent rule-of-thumb test of a worker's journeyman standing is the number of years' apprenticeship he has served—the generally accepted standards of which vary from craft to craft. We will, however, recognize an experience equivalent where it is clearly demonstrated to exist. . . . All the craftsmen included in the unit must be practitioners of the same allied craft. Furthermore, such craftsmen must be primarily engaged in the performance of tasks requiring the exercise of their craft skills.

In its enigmatic footnote decision in the case at bar (supra p. 5), the Board made none of the findings necessary to severance under the doctrine of *American Potash*, other than that the Lithographers traditionally represent employees engaged in offset work. There is *no* finding that the unit sought is a true craft group, *no* finding that these employees possess craft skills, *no* finding that they are primarily engaged in exercising craft skills, *no* mention whatsoever of apprenticeship or training, *no* determination that these employees constitute a distinct and homogeneous group. The evidence to the contrary was apparently ignored by the Board.

There is only the Board's statement that these employees operate "offset presses which use the traditional and customary lithographic processes". This finding is

concerned only with the characteristics of a machine. It does not establish the skill of the men who operate the machine any more than does the use of craftsmen's tools by a home owner establish that he is a craftsman. Thus, in the kind of case where the Board a few years before had laid down a set of requirements which it said would "not be relaxed over a period of time" (107 N.L.R.B. 1423), the court was afforded no standards and no findings to which to apply the Sec. 10(e) test of "substantial evidence on the record considered as a whole" (29 U.S.C. 160(e)).

The Seventh Court of Appeals sanctioned this failure of the Board to support its unit determination with the findings required by its own standards, but only by deciding that *American Potash* did not apply. It said that the Board had determined that the operations were not integrated, and that *American Potash* applied only to integrated industries (infra p. 9a). This ruling is contrary to the clear holding of *American Potash* and repudiated a flat statement by the Board in its reply brief that the *American Potash* criteria apply "without regard to the nature or degree of integration in the industry involved . . ." (infra, p. 28a). See also N.L.R.B.'s 23rd Annual Report for the Fiscal Year Ended June 30, 1958, p. 36.

As recently as July 29, 1960, the Board has reaffirmed its adherence to *American Potash* and followed its standards in a case quite similar to the case at bar, involving a Lithographers' election petition in a folding box plant. *Lord Baltimore Press, Incorporated*, 128 N.L.R.B. No. 40. Contrary to the holding of the Seventh Court of Appeals in the case at bar, the Board applied *American Potash* standards in this case while at the same time stating that the plant's production was *not* integrated within the doctrine of *National Tube*, were that doctrine still applicable.

The Board has consistently applied the *American Potash* standards without considering whether or not the particular industry was integrated. In numerous cases these standards have been applied to permit or deny craft severance or departmental severance after the Board has refused to consider integration as a ground for precluding any severance. As examples, see *J. H. Baxter and Company*, 118 NLRB 682 (where the industry had previously been held not to be integrated); *E. I. Dupont de Nemours & Co.*, 119 NLRB 723; *The American Brass Company*, 120 NLRB 1276; *Dana Corp.*, 122 NLRB 365 (1958); *Lear, Inc.*, 123 NLRB 713.

It is wholly implausible that the Board's footnote statement (B.A. 92) concerning integration of the employer's operations had any relationship to the *National Tube* doctrine. By citing *McCall Corporation*, 118 NLRB 1332, the Board was referring to an entirely different and special doctrine, that of *Pacific Press, Inc.*, 66 NLRB 458. In that latter case, involving the commercial printing industry, the Board ruled that an integrated printing department of offset and letterpress employees constituted an appropriate unit, and a separate lithographic unit was inappropriate, when the lithographic employees regularly and continuously interchanged between offset and letterpress. In *McCall Corporation*, 118 NLRB at 1334, the issue was whether the degree of integration between the offset and letterpress crews was sufficient for application of the *Pacific Press* doctrine. Neither case involved the *National Tube* doctrine of an integrated plant-wide production process.

If the Board's footnote regarding integration had any legal relevance to the application of *American Potash* standards, the Board thereby adopted a new policy governing craft severance by returning to the principles of *National Tube*. Again the Board's decision provides no

assistance to the reviewing court. It does not intimate that Board policy has changed; it gives no reasons why it should.

The decision of the Board in the case at bar meets neither the standards required by the statute nor the standards for administrative adjudications required by this and the lower federal courts. The National Labor Relations Act, sec. 10 (c), 29 U.S.C. sec. 160 (c), expressly requires "findings of fact" in an unfair practice proceeding. Here the finding was essentially a refusal to review what the Board had previously determined in the representation proceeding (B.A. 16). The record in that latter proceeding, with its truncated footnote decision, was the record upon which the final decree enforcing the Board's order was based (29 U.S.C. sec. 9 (d)). The absence of findings in the representation case is therefore fatal to the agency determination in the unfair practice case. *N.L.R.B.* v. *Capital Transit Co.*, 221 F. 2d 864 (D.C. Cir. 1955).

In numerous cases this Court has spelled out the need for clarity in the exercise of administrative discretion. Thus an inadequately supported conclusion of the Board was condemned in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197 (1941):

> The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has

> exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

The same requirements were pointed out and re-emphasized in the *Chenery Corporation* cases. In *S.E.C.* v. *Chenery Corporation*, 318 U.S. 80, 94 (1943), the Court noted the distinction between the scope of administration discretion and the clarity of its exercise:

> That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

The requirement of clarity was again restated when the case reached this Court a second time (*S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 196-197 (1947)):

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Again, in *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), the agency conclusion was insufficiently supported. There the Interstate Commerce Commission made findings, but the determination was a departure from its precedents, and the Commission failed to justify by findings or to explain adequately its departure from prior

norms. The case was remanded to the agency. Compare *N.L.R.B.* v. *Don Juan, Inc.*, 178 F. 2d 625 (2 Cir. 1949) with *N.L.R.B.* v. *Don Juan, Inc.*, 185 F. 2d 393 (2 Cir. 1950).

In numerous cases the absence or inadequacy of findings of basic facts has proved fatal to the agency determination. See e.g. *North Carolina* v. *United States*, 325 U.S. 507 (1945); *Florida* v. *United States*, 282 U.S. 194 (1931); *In re United Corporation*, 249 F. 2d 168 (3 Cir. 1957); *N.L.R.B.* v. *Capital Transit Co.*, 221 F. 2d 864 (D.C. Cir. 1955). Such findings are necessary whether or not required by statute. *Coffey* v. *Jordan*, 275 F. 2d 1 (D.C. Cir. 1959). In others, such as *Secretary of Agriculture* v. *U. S.*, (supra, p. 12), some findings were made but not related to the conclusion in light of applicable agency standards, and the departure was unexplained. In still others, such as *Phelps Dodge Corp.* v. *N.L.R.B.*, (supra, p. 11), the reasons for adopting an admittedly different policy were not articulated. The consistent thread running through these decisions is the requirement that an administrative agency must disclose the processes by which it reaches its result in order to permit the court to exercise its review function.

Here the Board took refuge in a so-called "Globe" or self-determination election. It ruled that the employer's lithographic employees "may" constitute a unit appropriate for collective bargaining and went on to find the smaller unit appropriate only if a majority of the lithographic employees voted for the Lithographers union (B.A. 92). Thereby the administrative tribunal merely ratified in advance a unit to be determined if the employees voted for one union, as against a different unit if they voted for a different union.

The Board customarily directs a self-determination election whenever a smaller unit is to be severed from a larger

one. The practice of directing such elections, upon the basis of an unsupported and unelaborated conclusion that a particular unit "may" be appropriate, can only result, as the employer feels it did here, in a routine reference of the issue to the employees and consequently in a failure to make a considered unit determination.

The employees' selection of a particular union is thus elevated to the decisive, and perhaps the only, consideration in the designation of an appropriate unit. This marks a sharp departure from this Court's statement of standards in *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146 at p. 156 (1941). It is a surrender by the Board of its duty to decide the appropriate unit "in each case" (29 U.S.C. sec. 9 (c)), as was recently pointed out by the Fourth Circuit in *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 at page 173 (4 Cir. 1959), cert. den. 361 U.S. 943 (1960).

The Board made an ultimate determination in the case at bar without making any findings justifying severance under its policies or giving any explanation which would justify their absence. Instead, it found as an ultimate fact that the unit "may" be appropriate and left the actual resolution to the employees. Such a determination precludes effective judicial review, and its sanction by the courts encourages careless and mechanical decisions by a tribunal to which a wide and important discretion is entrusted.

The N.L.R.B. made a total of 1,946 bargaining unit determinations in 1959,[3] and many of these had a vital effect on the productive processes involved. We urge this court to review the adequacy of the administrative determinations in this most important area.

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[3] 24th Annual Report of the National Labor Relations Board (1959) p. 3.

2. **Present Board policy governing craft and departmental severance is arbitrary and discriminatory.** The Board's adamant refusal to consider the effect of integrated production in all severance cases under *American Potash* and its contemporaneous but diametrically opposite policy of refusing severance on the grounds of integrated production in the four basic industries was condemned by the Fourth Circuit in *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, cert. den. 361 U.S. 943 (1960). The decision of the Seventh Circuit in the case at bar is in conflict with the Fourth.

The Fourth Court of Appeals directly addressed itself to the shift in Board policy from the *National Tube* doctrine to the standards of *American Potash*. It found the Board's present policy, which insulates four industries from craft or departmental severance but grants severance in all other industries regardless of the degree of integration of operations, to be arbitrary and discriminatory. Concluding that "the Board has adopted the flat rule that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft and that this rule is to be applied irrespective of the established practice of collective bargaining prevailing in the industry," (at p. 172), the Court went on to condemn this discrimination between industries regardless of the facts as a surrender of the Board's statutory responsibility to determine the appropriate unit in each case (Sec. 9 (b) U.S.C. 159 (b)).

In the case at bar, the Seventh Circuit believed that the Board had applied the integrated production test and had found the Middlebury plant to be insufficiently integrated, with the result that the question of discrimination did not arise. We have already pointed out why the Board was not thinking in terms of integrated plant-wide production

in this case (supra, p. 10). At no time has the Board suggested that the *American Potash* doctrine no longer prevails and, indeed, it reaffirmed that doctrine as applied to lithographic severance in the folding box industry in *Lord Baltimore Press, Incorporated*, 128 NLRB No. 40 (July 29, 1960). In that case the Board expressly refused to follow the *Pittsburgh Plate Glass* decision. Yet the Seventh Circuit ascribed to the Board in the case at bar an intention to depart from this policy, coupled with a finding which *eo instante* satisfied the newer (but unarticulated) policy. Thus the employer was, in the Court of Appeals, deprived of the application of *American Potash* standards and yet received no apparent consideration by the administrative agency of the *National Tube* integrated industry standard.

This peculiar circumstance, whereby the employer was deprived of the integrated industry standard on the administrative level and had the same standard applied to its prejudice in the Court of Appeals, was caused by the obscurity of the Board's decision. Neither the employer nor the Seventh Court of Appeals could actually know how the Board reached its decision in this case, so truncated is the opinion.

This same obscurity conceals, superficially, the conflict between the decision of the Seventh Circuit and of the Fourth Circuit. But the conflict clearly exists. The Fourth Circuit held in *Pittsburgh Glass*, that the Board acted discriminatorily in *refusing* to apply the integrated production standard in any except the four basic industries, whereas the Seventh Circuit in the case at bar ruled that the Board *did* apply that standard at Middlebury but found it unsatisfied. These two Court of Appeals decisions cannot be reconciled. The Board in its reply brief in the court below agreed with the Fourth Circuit's interpretation of Board policy, (infra, p. 28a), although it has expressly refused to

abandon its *American Potash* policy in the face of the Fourth Circuit criticism. *Lord Baltimore Press, Incorporated*, 128 N.L.R.B. No. 40 (July 29, 1960). At the same time, despite the interpretation of its policy by the court below in the case at bar, it continues to apply *American Potash* regardless of the degree of integration. The result is a tangled confusion of different standards and policies, attributable in considerable measure to the failure of the Board to articulate properly its decision in the case at bar.

We subscribe to the view of the Fourth Circuit, that the Board does arbitrarily and discriminatorily refuse to consider integration of production in all except four basic industries, and we urge the Court to resolve the conflict between the Circuits.

CONCLUSION

For the reasons stated, we respectfully request that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION IN THE COURT BELOW

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12793

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WEYERHAEUSER COMPANY, a Corporation, as successor to the Ace Folding Box Corporation, *Respondent*.

On Petition for Enforcement of an Order of the National Labor Relations Board.

April 6, 1960

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is a case of first impression before a Court of Appeals testing the appropriateness of a collective bargaining unit composed of lithographic press employees in the paper box industry, a case in which a craft unit was severed from an existing certified industrial union.

It comes before us on the petition of the National Labor Relations Board (Board) pursuant to the provisions of Section 10(e) of the National Labor Relations Act (the Act), 29 U.S.C.A. , 160(e). The Board prays for enforcement of its order issued against Ace Folding Box Corpora-

tion requiring that it cease and desist from its refusal to bargain with the duly certified representative of certain employees, the Amalgamated Lithographers of America, AFL-CIO (Lithographers). Subsequent to the Board's issuance of the order, Ace Folding Box Corporation was merged into the Weyerhaeuser Company and dissolved. By order of court, Weyerhaeuser Company presently is the proper respondent. The court denied Lithographers' motion to intervene in this proceeding but granted its alternative request to file a brief *amicus curiae*.

The chronology of this dispute follows: On February 23, 1958, Lithographers filed a representation petition for a separate craft unit pursuant to Section 9(c) of the Act, 29 U.S.C.A. 159(c), in which it requested certification as the bargaining representative of all lithographic production employees at respondent's plant in Middlebury, Indiana. At the time the petition was filed, all hourly employees in respondent's plant were represented by the United Paperworkers of America, Local 10181 AFL-CIO (Paperworkers). This certified industrial unit included, among others, letterpress employees, offset press employees, ink mixers and storekeepers, cutting pressmen, glue machine operators, die makers, and maintenance and repair workers. Paperworkers was permitted to intervene in the representation proceeding by virtue of its contract.

The Board found a lithographic craft unit appropriate and defined its scope to include all pressmen, apprentice pressmen, feeders, helpers, and floormen engaged in offset (lithographic) work at respondent's plant, excluding all other employees and supervisors as defined in the Act.

The Board directed that an election be conducted among the designated employees.[1]

Both respondent and Paperworkers petitioned for reconsideration of the decision, but the Board denied the request. The Board did, however, specifically amend its short-form election specification. It found that in these circumstances either the craft (Lithographers) or the industrial (Paperworkers) unit was appropriate and ordered certification of the union which would receive a majority of votes to be cast.

On July 3, 1958, seventeen eligible employees voted on ballots that gave two choices—representation by Lithographers or by Paperworkers. Twelve employees voted for Lithographers; four, for Paperworkers; and one bal-

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[1] The unreported short-form decision of the Board, Case 13-RC-5879, to split off a craft unit of lithographic production employees from the existing industrial union was rationalized in this footnote finding:

"[Lithographers] seeks to sever the [requested] unit of all employees engaged in the offset process from the plantwide unit currently represented by [Paperworkers]. [Paperworkers] contends primarily that no election should be directed; alternatively that severance should include letterpress as well as offset employees. [Respondent] opposes severance and also urges that [Lithographers] has not established that the employees it seeks constitute a true craft unit.

"The employees sought by [Lithographers] are engaged in the operation of offset presses which use the traditional and customary lithographic processes. Although they have in some instances transferred to offset work from other parts of the plant there is not such regular and continuous interchange as would preclude their separate representation or dictate a combined letterpress and offset unit. Cf. *Pacific Press, Inc.*, 66 NLRB 458. We find that these employees, may, therefore, constitute a separate appropriate unit, and that there is no such integration of [respondent's] operations as would preclude their separate representation. *McCall Corporation*, 118 NLRB 1332. As [Lithographers] is a union which traditionally represents such employees, we shall direct an election in the unit it seeks."

lot was void. Consistent with the election results, on July 14, 1958, the Board certified Lithographers as the collective bargaining representative of the lithographic production employees.

Lithographers requested a bargaining conference with respondent on July 22, 1958; respondent has declined to bargain. Upon Lithographers' charge of refusal to bargain, the Board issued an unfair labor practice complaint on November 18, 1958.

At the hearing on the complaint before the trial examiner, the Board, respondent, and Lithographers appeared; Paperworkers was permitted to intervene. Subsequently, the Board adopted the trial examiner's intermediate report which found that respondent had violated Sections 8(a)(5) and (1) of the Act by its refusal to bargain with Lithographers. Accordingly, the Board directed respondent to cease and desist from its unfair labor practices, to bargain with Lithographers upon request, and to post appropriate notices. 124 NLRB No. 9 (1959). It is the enforcement of this order that the Board requests.

Respondent's opposition to the enforcement of the order is based on four contentions: (1) the Board's determination that the bargaining unit in question was appropriate constituted arbitrary action and was not supported by substantial evidence; (2) the Board's election procedure was improper inasmuch as (a) it allowed the employees to determine the appropriate unit and (b) the representation ballot offered employees no opportunity to vote "no union"; (3) the Board erred in refusing to consider the effect of Lithographers' disaffiliation from the AFL-CIO after its certification; (4) the Board erred in refusing to consider the effect of Lithographers' alleged violation of the AFL-CIO no-raiding agreement.

Upon examination, we hold that each of respondent's contentions cannot be sustained and that we should enter a decree enforcing the Board's order in full.

I

With reference to respondent's challenge to the appropriateness of the bargaining unit, it is axiomatic that the Board has wide discretion in establishing the correct limits of a bargaining unit. The Board's act of "informed discretion" is based on the particular facts of each case and will be reversed only when there is a capricious and arbitrary exercise of such discretion. We must affirm the Board's factual findings when they are supported by substantial evidence on the record considered as a whole. 29 U.S.C.A. § 160(e). *Packard Co.* v. *Labor Board*, 330 U.S. 485, 491 (1947); *International Union, Etc.* v. *National Labor Rel. Bd.*, 7 Cir., 231 F. 2d 237, 243 (1956); *National Labor Relations Board* v. *Esquire, Inc.*, 7 Cir., 222 F. 2d 253, 256 (1955); *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Bd.*, 7 Cir., 162 F. 2d 435, 439 (1947); *Valley Mould & Iron Corp.* v. *National Labor R. Board*, 7 Cir., 116 F. 2d 760, 764 (1940), cert. denied, 313 U.S. 590.

The standards limiting our review apply equally to the Board's original designation of the appropriate bargaining unit (Paperworkers) and to the subsequent situation, as here, where it must determine whether to carve out an appropriate craft unit from an existing industrial unit. The only restriction in the Act itself is the mandate that the Board cannot refuse to sever a craft unit from the existing industrial unit solely on the ground that a different bargaining unit has been established in a prior Board determination. See Section 9(b)(2) of the Act, 29 U.S.C.A. § 159(b)(2).

A résumé of the facts before us indicates that the Board did not act arbitrarily in its severance of a craft unit composed of eighteen lithographic production employees. Respondent is engaged in the manufacture of folding paper boxes. Its production run generally involves printing, cutting, and gluing the raw material, known as paper board. After processing, the empty paper boxes are folded flat, packed and shipped out in such folded condition. Prior to 1956, respondent carried on these activities in a plant in White Pidgeon, Michigan, in which the printing was done solely by letterpress. Late in 1954, the Board ordered a representation election held in that plant; and subsequently, Paperworkers was certified as the bargaining agent for all eligible employees.

In 1956, respondent moved into a new single-floor plant in Middlebury, Indiana. In this plant it installed four letterpresses and added a five color offset (lithographic) press. At the time of the representation hearing respondent was preparing to install a second offset press.

Essentially, a letterpress operation produces the printed impression by pressing an unprinted sheet against a raised, inked surface; it is often described as a "mechanical" operation. "The lithographic process is distinguishable from letterpress printing in that it involves printing from a plane surface and depends for its operations upon a chemical difference between various portions of the surface of the plate used in making the impression. Each step in the process is separate and distinct from that of letterpress." *Fey Publishing Company*, 108 NLRB 1031, 1032 (1954). The record discloses testimony that the lithographic method of reproduction is used not only on paper but also in the metal decorating and toy industries,

in the plastic industry and in the textile industry to decorate cloth.

Respondent employed 100 to 110 hourly employees and 30 to 35 salaried employees in two shifts. Fifteen to twenty employees worked on the letterpresses. Of the remaining hourly employees, Lithographers requested a craft unit composed of "all lithographic production employees." It claimed that at least twelve employees should be included in the unit (two five-color pressmen, two second pressmen, two five-color apprentices, two five-color feeders, and four five-color helpers). It also left to the discretion of the Board the question of whether six floor men should be included in the craft unit; ultimately, the Board included the floormen in the unit.

Before the hearing officer respondent attempted to present a pattern of total integration within its plant. However, there was substantial countervailing testimony which supports the Board's conclusion that a separate unit is appropriate: the nature of the work engaged in by the individuals in the unit; the minimal interchange of personnel between the letterpress and offset crews; the separate foremen on the day shift; the original employees on the offset crew were largely hired outside the plant, many with prior lithographic experience; the original five offset pressmen were given a two-month period of training in Chicago; promotions in the offset group were initially considered from within that group before general bidding from the plant as a whole; and the wage pattern of the offset unit was separate from and higher than that of the comparable letterpress crew. Further, there was undisputed testimony that respondent's offset press was of the usual type and that the skills to operate it were those normally associated with lithographic employees.

It would serve no purpose more minutely to describe the production process in respondent's plant. It is sufficient to say that a careful reading of the record before us supports the determination of the Board in this case. The unit is appropriate.

The result we reach in this case of first impression is consistent with the long-established practice of the Board in recognizing the particular skills possessed by lithographic employees. Lithographers cites in its brief more than 450 cases over a course of sixteen years in which a unit limited to lithographic employees was held appropriate. However, in the proper case, the Board has refused separate representation for lithographic employees. Cf. *Pacific Press, Inc.*, 66 NLRB 458 (1946), in which a single crew regularly and continuously worked on both letterpresses and offset presses.

The parties have cited three reported cases involving lithographers who requested craft bargaining status in the folding box industry. *Sutherland Paper Company*, 122 NLRB 1284 (1959); *Harvey Paper Products Company*, 116 NLRB 1624, 1626 (1956); and *Pacific Coast Association of Pulp and Paper Mfrs.*, 94 NLRB 477 (1951). In each of these cases the Board held appropriate either the industrial or craft unit and ordered employees to vote on their preference. However, as distinguished from the facts before us, the employees there voted for the industrial unit.

Respondent has argued that the present case must be considered in the light of the *American Potash* and *National Tube* doctrines. Briefly, these cases (*National Tube Company*, 76 NLRB 1199 (1948) and *American Potash & Chemical Corporation*, 107 NLRB 1418 (1954) illus-

trate the shifting policy of the Board toward the standards of craft unit severance in integrated industries previously represented by industrial unions. The recent case of *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 4 Cir., 270 F. 2d 167 (1959), cert. denied, ... U.S. .... (1960), held that this change of standards and its application constituted arbitrary and unlawful action on the part of the Board.[2] Respondent contends that the Board's action here is based on the principles of the *American Potash* doctrine and, as such, must fall as arbitrary action.

The direct answer to respondent's argument is that *National Tube*, *American Potash* and *Pittsburgh Plate Glass* involved industries *found to be integrated* and set applicable standards for severing a craft unit within such industries which had existing industrial unions and a long pattern of industrial bargaining. Here, the key finding of the Board, for which we found substantial support, *supra*, is that respondent's plant is *not* integrated. The Board found that "there is no such integration of the Employer's operation as would preclude their separate representation." Further, it is significant to note that prior to *American Potash* the Board had determined that the degree of integration within the paper and pulp industry and within the paper carton industry was not sufficient to make the *National Tube* doctrine applicable. See, *Pacific Coast Association of Pulp and Paper Mfrs.*, 94 NLRB 477, 480 (1951).

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[2] In *National Labor Rel. Bd.* v. *Libbey-Owens-Ford Co.*, 4 Cir., 241 F. 2d 831 (1957), the same court held that in a similar case where the Board expressly based its decision on grounds other than the criteria of the rule enunciated in the *American Potash* case, it was not appropriate for that court to enter into a discussion of the rule. In the instant case the Board did not rely on the *American Potash* rule.

In addition respondent has orally argued that the craft unit is inappropriate because of the potentiality of increased economic friction within its plant. It foresees one union demanding a thirty-five hour week while the other bargains for a forty hour week, separate grievance procedures and seniority provisions, and distinct wage patterns. However, the economic consequences that flow from negotiations at the bargaining table cannot be controlling in establishing an appropriate bargaining unit.

Having considered the record before us which discloses the factual setting of respondent's manufacturing operations, the long history of the Board's recognition of the cohesiveness of the bargaining interests of lithographers, the reasonable standards by which the Board exercised its "informed discretion," and our limited function in reviewing the establishment of an appropriate bargaining unit, we cannot say that the Board's action was arbitrary or lacked substantial evidentiary support.

II

Respondent further challenges the election procedure of the Board. Its first complaint is that the Board abdicated its function and allowed the employees to select the appropriate bargaining unit in violation of the statutory mandate that the Board "shall decide in each case whether * * * the unit appropriate * * * shall be * * * [a] craft unit * * *." 29 U.S.C.A. § 159(b). This delegation of its function was accomplished, it is alleged, because the Board conducted a self-determination ("Globe") election in which the employees in question voted either for Lithographers or for Paperworkers as their bargaining representative. Since a majority picked Lithographers, that union was certified as the proper bargaining agent.

Respondent relies on a case from this circuit to sustain its position. In *Marshall Field & Co.* v. *National L. Relations Board*, 7 Cir., 135 F. 2d 391 (1943), a divided court held that the Board unlawfully delegated its proper function of selecting the appropriate bargaining unit to the employees. There, the Board held that the employees under consideration "might together constitute a separate bargaining unit or they might appropriately be included as part of a [larger] unit [and] that the determining factor should be the desires of the employees themselves [as measured in a representation election]." The court found error because of the "failure of the Board to designate the unit *before* holding the election." 135 F. 2d at 393.

Respondent originally argued this point in its Petition for Reconsideration of the Board's Decision and Direction of Election of June 5, 1958. Thereafter, on June 23, 1958, in an Order denying the Petition for Reconsideration, the Board amended its findings to hold expressly that the craft unit in question here was appropriate. Since the technical flaw present in the *Marshall Field* case does not exist here, that case does not control. Indeed, the majority in *Marshall Field* remanded the case to the Board with directions to proceed by *first* establishing the unit and subsequently conducting an election, if necessary. This is the precise procedure the Board ultimately adopted and followed in the case at bar.

However, this decision need not turn on such narrow grounds. The Board has broad powers to conduct representation elections. *Labor Board* v. *Pacific Co.*, 329 U.S. 324, 330-31 (1946); *Southern S.S. Co.* v. *Labor Board*, 316 U.S. 31, 37 (1942); *Labor Board* v. *Falk Corp.*, 308

U.S. 453, 458 (1940). Globe elections have been conducted by the Board since 1937. *The Globe Machine and Stamping Co.*, 3 NLRB 294 (1937). See also, *Otis Elevator Co.*, 108 NLRB 1351 (1954); *Phillips Petroleum Company*, 107 NLRB 1207 (1954); *Duval Sulphur and Potash Company*, 107 NLRB 1002 (1954); *Art Metal Construction Company*, 75 NLRB 80 (1947). Such elections have been recognized by the courts, although in only one case has the procedure itself been challenged. In *National Labor Relations Bd.* v. *Underwood Mach. Co.*, 1 Cir., 179 F. 2d 118 (1949), the court approved the election and distinguished *Marshall Field* factually (since the Board had expressly found the unit in question appropriate) but on more broad grounds found the dissenting opinion of Judge Minton in *Marshall Field* to be "persuasive." Later cases in which Globe elections appear unchallenged include *National Labor Relations Board* v. *Grace Co.*, 8 Cir., 184 F. 2d 126 (1950); *Mueller Brass Co.* v. *National Labor Relations Bd.*, D.C. Cir., 180 F. 2d 402, 404 (1950); *Glen Alden Coal Co.* v. *National Labor Relations Board*, 3 Cir., 141 F. 2d 47 (1944).

The Supreme Court has held that the wishes of the employees are one factor in the Board's exercise of its discretion in establishing an appropriate unit. *Pittsburgh Glass Co.* v. *Board*, 313 U.S. 146, 156 (1941). Section 9(b)(2) of the Act recognizes that self-determination elections are an integral part of craft severance cases. We hold that the Board has sufficient power to order a self-determination election.

As part of its challenge of the election procedures, respondent states that the ballot provided no opportunity for the employees to vote "no union." The exclusion of

this choice, respondent argues, is a violation of the employee's rights under Section 7 of the Act to refrain from union activity.

Prior to 1956, consistent with general Globe election practice, the Board included a "no-union" choice on its craft severance ballot. But it discontinued this procedure in *American Tobacco Company, Incorporated*, 115 NLRB 218 (1956). There the Board stated that "[n]othing in the Act or its legislative history * * * expressly or impliedly requires that employees in a craft severance election be afforded an opportunity to return to nonunion status." 115 NLRB at 220. Indeed, a "no-union" choice in a craft severance election would be an indirect proceeding for partial decertification. Cf. *Campbell Soup Company*, 111 NLRB 234 (1955). The Board's balloting procedure here did not deny the employees any rights accruing to them because of the general provisions of Section 7 of the Act.

Further, respondent charges that because of the existence of the Indiana "right-to-work law," Burns' Ind. Stat. Ann. §§ 40-2701—40-2703 (1952 Repl. Supp.), employee rights are curtailed in some undefined way. We do not agree.

Election and certification merely designate the union, pursuant to the choice registered by a majority of the employees who voted, as the representative for collective bargaining purposes. Such election does not compel any employee to join any union. We find no conflict with the Indiana statute. There was no error in the hearing officer's refusal to admit evidence concerning the Indiana right-to-work law.

III

Respondent's third major challenge to the enforcement of the Board's order to bargain is that the Board in the unfair labor practice proceeding refused to consider the effect of Lithographers' disaffiliation from the AFL-CIO, which raises doubt as to Lithographers' identity—that is, whether it is the same organization as that selected and certified. At the time of the representation election, certification, and the request and the refusal to bargain, Lithographers was affiliated with the AFL-CIO. Subsequently, on August 21, 1958, Lithographers disaffiliated from the AFL-CIO. In these circumstances, disaffiliation is not relevant to the question of appropriateness of the unit, but goes directly to the question of whether respondent has refused to bargain with the certified representative.

Respondent made two offers of proof before the trial examiner, who rejected both. The first had to do with the mechanics of disaffiliation, shown by the AFL-CIO constitution. The Board properly rejected this offer since it was not evidence of "probative value" to prove a change in the organic structure, composition, or leadership of a labor organization, necessary elements in the proof of a change of identity of a labor union. A mere change of name or disaffiliation with the AFL-CIO is not sufficient. *Union Carbide & Carbon Corp. v. National Labor Rel. Bd.*, 6 Cir., 244 F. 2d 672, 673 (1957); *Carpinteria Lemon Ass'n. v. National Labor Rel. Bd.*, 9 Cir., 240 F. 2d 554, 557 (1956); *National Labor Relations Board v. Harris-Woodson Co.*, 4 Cir., 179 F. 2d 720, 723 (1950); *Continental Oil Co. v. National Labor Relations Board*, 10 Cir., 113 F. 2d 473, 477 (1940).

Respondent's second offer of proof was oral testimony as to the possible effect of disaffiliation on the outcome of the representation election. This is not evidence of a change in identity, but is an apparent effort to relitigate the question of what constitutes an appropriate unit. Under the circumstances of this case, the Board held that such evidence should have been presented in a petition to reconsider the determination of the appropriate unit. We find no error in the Board's holdings.

IV

Respondent's final challenge to the enforcement of the Board's order is that the Board erred in refusing to consider the defense that Lithographers, in filing its representation petition, violated the "no-raiding" provision of the AFL-CIO constitution to which Lithographers and Paperworkers had subscribed.[3]

It appears from the record that this issue was first raised in the representation hearing when Paperworkers moved for a stay pending the processing of a formal complaint to the president of the AFL-CIO charging Lithographers with a violation of the no-raiding provision. This stay was denied by the hearing officer, and the Board made no reference to it in ordering the election.

This issue was next raised in the unfair practice proceeding after Paperworkers was permitted to intervene.

[3] Article III, Sec. 4 of the AFL-CIO Constitution provides that "* * * no affiliate shall raid the established collective bargaining relationship of any other affiliate." In addition it set up a procedure for settling and arbitrating disputes. Lithographers and Paperworkers subscribed to these provisions by approving and joining in the merger of the AFL and the CIO.

For history and text of no-raiding agreement, see 2 CCH Lab. L. Rep. ¶ 5230.95 *et seq.*

Respondent pleaded it as an affirmative defense. Paperworkers was joined by respondent in certain offers of proof which were denied by the trial examiner. The Board sustained the trial examiner.

The Board contends that *respondent* cannot now raise this issue since it was neither a party to nor a third party beneficiary of the no-raiding agreement. However, as we have pointed out, this issue was before the Board at every stage of this proceeding. The Board refused to consider or give effect to the alleged violation of the no-raiding agreement as a defense to the refusal to bargain. We think this refusal by the Board is properly before us for review in this case and should not be rejected on technical procedural grounds.[4]

The Board then argues, in the alternative, that it was not required to give controlling effect to the no-raiding agreement between the two unions in this case and that it properly directed an election to ascertain the desires of the lithographic employees here involved as to separate representation by Lithographers. This is consistent with its established policy against considering such agreements.

In many cases the Board has refused to dismiss representation petitions upon a showing that they were filed in violation of no-raiding agreements.[5] But, it has recog-

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[4] General language quoted by the Board from *National Labor Relations Board* v. *National Mineral Co.*, 7 Cir., 134 F. 2d 424, 429 (1943), and *National Labor Relations Bd.* v. *Sanson Hosiery Mills*, 5 Cir., 195 F. 2d 350, 352 (1952), in support of its contention is taken out of context. Those cases are readily distinguishable from the case at bar.

[5] Typical of such cases are *E. W. Coslett & Sons*, 122 NLRB 961 (1959); *The Steck Company*, 122 NLRB 12, 13 (1958); *The Borden Company*, 120 NLRB 1447 (1958); *American Potash & Chemical Corporation*, 117 NLRB 1508, n. 1 (1957); *F. C. Russell Company*,

nized situations in which it will permit the withdrawal of such a petition." As stated in its brief, the Board's position is that the rights to organize and to choose a bargaining representative which accrue to employees by Section 7 of the Act cannot be diminished or circumscribed by private inter-union no-raid agreements. In the Board's view, although these agreements attain the beneficial goal of promoting industrial stability, they do so only at the price of sacrificing employees' freedom to choose a bargaining representative. Industrial stability here must be subrogated, the Board contends, because only in that way may employees have the right to rid themselves of inefficient and corrupt unions. No-raiding agreements bring stability, but only by preserving the status quo and the monopoly power of the incumbent union. On balance, the Board has held that the employee rights guaranteed by Section 7 are of primary importance. Research discloses no appellate case which has ruled directly on the propriety of this decision.

In *United Textile Workers* v. *Textile Workers Union*, 7 Cir., 258 F. 2d 743 (1958), we held that Section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, provides a forum in a federal district court wherein an

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116 NLRB 1015, 1036 (1956); *Minneapolis Star and Tribune Company*, 115 NLRB 1300, 1301, n. 4 (1956); *North American Aviation, Inc.*, 115 NLRB 1090, 1091, n. 3 (1956); *La Pointe Machine Tool Company*, 109 NLRB 514, 516, n. 6 (1954); *Los Angeles Period Furniture Co.*, 43 NLRB 327, 329 (1942); *The Texas Company*, 4 NLRB 182, 185 (1937). For a history of Board's policy toward organizational raids and no-raiding pacts, see text and collection of cases, 1 CCH Lab. L. Rep. ¶ 2735.

" *See, Personal Products Corporation*, 122 NLRB 563 (1958). Cf. *Great Lakes Industries, Inc.*, 124 NLRB No. 50 (1959), reported in 5 CCH Lab. L. Rep. ¶ 50,185, ¶ 56,562 and ¶ 56,779. See also, Note, "N.L.R.B. Representation Procedure," 28 U. Cinc. L. Rev. 532 (1959).

action may be brought by one of the union signatories to a private no-raiding agreement between unions to compel observance thereof by the other signatory.[7] The complaining union sought equitable relief to enforce the findings of an impartial umpire appointed under the provisions of the AFL-CIO no-raiding agreement. The umpire found the agreement had been violated. This court affirmed an order of the district court directing the violating union to 'withdraw a representation petition from the Board. The Board had previously rejected the incumbent union's contention regarding the effect of the no-raiding agreement and had directed an election, but such election had not been held. Thereafter, the Board permitted withdrawal of the petition, but stated it did not acquiesce in this court's decision and that it would not, in the future, permit withdrawal unless the Board was made a party to court litigation so that it might express its views. *Personal Products Corporation*, 122 NLRB 563 (1958). Our holding in *United Textile Workers* gives effect to a *contract right* arising from a no-raiding agreement in a Section 301 proceeding in the district court.[8] It makes apparent that proceedings before the Board and judicial review under Section 10(e) of the Act are no longer the exclusive channel for deciding representation questions. Cf. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

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[7] Followed in *Local 260s, Etc.* v. *Millmen's Local 1195, Etc.*, D.C.N.D. Cal., 169 F. Supp. 765 (1958). *Contra, International Union, Etc.* v. *Metal Polishers, Etc., Union*, D.C.S.D. Cal., 180 F. Supp. 280 (1960).

[8] For conflicting views on this decision, see, Note, "Applying the 'Contracts Between Labor Organization' Clause of Taft-Hartley Section 301: A Plea for Restraint," 69 Yale L.J. 299, 306 (1959); *contra*, Note, "Jurisdiction of Federal District Court to Specifically Enforce Interunion No-Raiding Agreement Upheld," 59 Colum. L. Rev. 202, 204 (1959).

Unlike the situation in *United Textile Workers*, in the instant case there has been neither a decision by an umpire nor a suit brought in the district court under Section 301. We are concerned here with a judicial review under Section 10(e) of the Act. The Board correctly asserts that respondent and Paperworkers, by their offers of proof, were attempting to litigate the alleged no-raiding violation in a representation hearing and in the subsequent unfair practice hearing. The rights which arise under the AFL-CIO no-raiding agreement give *unions* a contractual immunity from organizational raids of competing unions. An established union which feels its rights have been violated has a forum in the district court under Section 301. In the case at bar it should be remembered that *Lithographers close to disaffiliate* from AFL-CIO. There may be a serious question whether under these circumstances an alleged prior breach of the no-raiding agreement could now be made the subject of a Section 301 action or be asserted as a bar to the representation proceeding. Under the narrow factual situation before us, we hold that the Board did not err in adhering to its policy of refusing to consider an alleged violation of the no-raiding agreement.

The extent to which such inter-union no-raiding agreements shall encroach on the Board's established policy of disregarding them in representation hearings must be worked out in the future on a case-by-case basis. This is in harmony with the mandate of the Supreme Court in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).

We do not here give blanket approval to the Board's policy of refusing to recognize no-raiding agreements. The resolution of that broader problem calls into play

the balancing of two beneficial, but conflicting, policy goals. The desire for stability in labor relations is in opposition to the right of freedom of choice in bargaining representation. There will also be the need for accommodating the statutory power of the courts to enforce contractual rights on the one hand with the jurisdiction vested in the Labor Board to determine questions as to representation on the other.[9] These matters will be determined in appropriate cases.

For the reasons stated, the Board's petition for a decree enforcing its order must be granted.

ENFORCEMENT ORDERED.

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[9] These and related questions have been the subject of much discussion. See Cox, "Some Current Problems in Labor Law: An Appraisal," 35 L.R.R.M. 48, 57-59 (1955); Aaron, "Interunion Representation Disputes and the NLRB," 36 Texas L. Rev. 846, 851-52 (1958); Jenkins, "The Impact of Lincoln Mills on the National Labor Relations Board," 6 U.C.L.A. L. Rev. 355, 365 (1959); Summers, "Union Powers and Workers' Rights," 49 Mich. L. Rev. 805, 818 (1951); Krislov, "The No-Raiding Agreement after Five Years," 10 Lab. L.J. 861 (1959); Krislov, "Raiding Among the 'Legitimate' Unions," 8 Ind. & Lab. Rel. Rev. 19 (1954); Krislov, "Everybody's Stake in the No-Raiding Agreement," 5 Lab. L.J. 83 (1954).

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, May 4, 1960

Before Hon. John S. Hastings, *Chief Judge*, Hon. Elmer J. Schnackenberg, *Circuit Judge* and Hon. Latham Castle, *Circuit Judge*.

National Labor Relations Board, *Petitioner*,

No. 12793

v.

Weyerhaeuser Company, a Corporation, as successor to the Ace Folding Box Corporation, *Respondent*.

Petition for enforcement of an order of the National Labor Relations Board.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

DECREE OF COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WEYERHAEUSER COMPANY, a Corporation, as successor to Ace Folding Box Corporation, *Respondent*.

No. 12793

May 23, 1960

DECREE

Before: HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Ace Folding Box Corporation, Middlebury, Indiana, its officers, agents, successors, and assigns on July 10, 1959. Thereafter, on January 21, 1960, this Court entered an order changing the name of Respondent to "Weyerhaeuser Company, a corporation, as successor to Ace Folding Box Corporation." The Court heard argument of respective counsel on February 17, 1960, and has considered the briefs and the transcript of record filed in this cause. On April 6,

1969, the Court, being fully advised in the premises, handed down its decision enforcing the Board's said Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said Order of the National Labor Relations Board in said proceeding be, and the same is hereby enforced; and that Weyerhaeuser Company, a corporation, as successor to Ace Folding Box Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

s JOHN S. HASTINGS
Judge, United States Court of Appeals
for the Seventh Circuit

s ELMER J. SCHNACKENBERG
Judge, United States Court of Appeals
for the Seventh Circuit

s LATHAM CASTLE
Judge, United States Court of Appeals
for the Seventh Circuit

PERTINENT STATUTES

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., sec. 151 *et seq.*) are as follows:

29 U.S.C. sec. 158 (a) (1) and (5):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees. . . .

29 U.S.C. Sec. 157:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U.S.C. Sec. 159 (b), (c) (1) and (d):

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such

unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against a separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect

thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

29 U.S.C. Sec. 160

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

"(e) The Board shall have power to petition any United States Court of Appeals (including the United States

Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28."

EXCERPT FROM REPLY BRIEF OF COUNSEL FOR BOARD IN COURT BELOW.

Pp. 2-3:

"Under these criteria, a craft unit will be split off from an established industrial unit whenever separate representation is sought with respect to a true craft group of employees and the union seeking such severance is a traditional representative of such craft, without regard to the nature or degree of integration in the industry involved and irrespective of its established practice of collective bargaining. In the court's view, the Board in *Pittsburgh Plate* was arbitrary in declining to consider evidence of integration and collective bargaining practices in the plate glass industry, while at the same time regarding those factors as relevant in four other industries, which were as highly integrated as plate glass."

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SEP 21 1960
JAMES R. BROWNING, Clerk

No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1960

WEYERHAEUSER COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-20a) is reported at 276 F. 2d 865. The Board's decision and direction of election in the representation case (B.A. 91-94),[1] are unreported. Its decision and order in the unfair labor practice proceeding (B.A. 11-23) are reported at 124 NLRB No. 9.

JURISDICTION

The opinion of the Court of Appeals was issued on April 6, 1960 (Pet. 1a), and the same day a judgment was entered implementing that opinion (Appendix, p.

[1] "B.A." references are to the Board's Appendix filed in the Court of Appeals.

11, *infra*). A petition for rehearing was denied on May 4, 1960 (Pet. 21a), and a formal decree was entered on May 23, 1960 (Pet. 22a-23a). The petition for a writ of certiorari was filed on August 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for certiorari was filed within the ninety-day period prescribed in 28 U.S.C. 2101(c).

2. Whether the Board's determination that petitioner's lithographic production employees constituted an appropriate bargaining unit was a reasonable exercise of its discretion under Section 9(b) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. 24a-26a).

STATEMENT

A. The Board Representation Proceeding

On February 28, 1958, the Amalgamated Lithographers of America, AFL-CIO, filed a representation petition with the Board, pursuant to Section 9(c) of the Act, requesting certification as the bargaining representative of all lithographic production employees at the petitioner's paper box plant in Middlebury, Indiana (B.A. 77-78). When the petition was filed, all employees in the plant were represented by United

Papermakers & Paperworkers, Local 1018, AFL-CIO, in a single plant-wide unit (B.A. 91; 81-82). At the hearing on the petition, the following evidence was presented concerning the appropriateness of a separate unit of lithographers:

Prior to 1956, the Company used only letter presses for printing (B.A. 28). In that year it installed lithographic offset presses, of the type generally used for commercial printing (B.A. 92; 28-31, 65-66, 75). To operate its new presses the Company hired the first five offset pressmen from the outside, without intra-plant "bidding" or requests for the new jobs among its existing employees, as had been its customary practice when other new jobs had been created (B.A. 50, 52-55, 58). Fourteen of the eighteen offset employees employed at the time of the hearing were hired directly from the outside for the offset operation (B.A. 56-57). The first and second pressmen came from commercial printing establishments (B.A. 47-49). Most of the other men had had previous lithographic experience (B.A. 50-58).

The original five offset pressmen were, after being hired, given sixty days of additional training in the operation of a lithographic press (B.A. 28-29, 46-47, 51). The plant library contained books on lithography which all offset personnel were urged to read (B.A. 48). In addition, the Company maintained an apprentice system to train new personnel for the offset press (B.A. 43, 52-53). The skills necessary to run this press and its method of operation were the same as for lithographic presses generally (B.A. 45-46, 65-66).

A special foreman supervised the 18 offset employees (B.A. 43-45). The time cards of these employees were kept separately (B.A. 49). Interchange of personnel

between the offset unit and other departments of the plant was rare, and the only exchange from the letter press to the offset press had been a temporary transfer at the apprentice level for a week or two because of a vacation or leave (B.A. 58-61). Promotions were made from within the offset group, and were not posted for plant-wide applications initially (B.A. 58). No employee from another department had ever exercised seniority to "bump" a person in the offset department during layoffs (B.A. 59). Moreover, offset pressmen had a separate wage schedule which was generally higher than that of other plant employees (B.A. 62-63, 79-80), and as a result of an agreement between the Paperworkers and the Company in May, 1957, the differential was increased still further (B.A. 62-63, 81).

The Lithographers Union, which sought to represent the lithographic unit, was founded in 1882, and had restricted its organizational activity to the representation of lithographic production employees (B.A. 71-74). It has union pay scales for differing lithographic skills, and conducts apprenticeship training programs for the lithographic industry (B.A. 66-68, 74-75).

On the foregoing facts, the Board found the employees in the offset department use the traditional and customary lithographic processes, and that the Lithographers Union was a traditional representative of employees performing such functions. Moreover, there was infrequent interchange of employees between the offset department and other departments in the plant, and no such integration of operations as would preclude separate representation of the offset employees. Accordingly, the Board concluded that the offset employees could constitute a separate appropriate unit, and directed an election in the offset department to

determine whether those employees desired separate representation or to remain in the existing plant-wide unit (B.A. 92). In the election, held on July 3, 1958, a majority of the offset employees manifested a desire for separate representation by voting for the Lithographers, and it was certified as their collective bargaining representative (B.A. 15-16; 95).

B. The Board Unfair Labor Practice Proceeding

Contending that a separate unit for lithographic employees was inappropriate, the Company refused to bargain with the Lithographers. Unfair labor practice charges were then filed with the Board, which, after hearing, sustained the validity of the certification previously issued and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to honor it. The Board ordered the Company to cease and desist from its unfair labor practices, and to bargain with the Lithographers. (B.A. 11-12.)

C. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order, holding that the Board acted within the limits of its discretion under Section 9(b) of the Act in determining that the petitioner's lithographic employees constituted an appropriate bargaining unit. Summarizing its holding, the court stated (Pet. 10a):

> Having considered the record before us which discloses the factual setting of respondent's manufacturing operations, the long history of the Board's recognition of the cohesiveness of the bargaining interests of lithographers, the reasonable standards by which the Board exercised its "informed discretion," and our limited function in

reviewing the establishment of an appropriate bargaining unit, we cannot say that the Board's action was arbitrary or lacked substantial evidentiary support.

ARGUMENT

1. The petition for certiorari was untimely to obtain review of the issues settled by the judgment of the court below. 28 U.S.C. 2101(c) requires that the petition be filed within ninety days of the judgment or decree of the court of appeals. The court below entered its judgment on April 6, 1960 (Appendix p. 11, *infra*), the same day as it issued its opinion. The filing of a petition for rehearing deferred the start of the ninety-day period until May 4, 1960, when rehearing was denied (Pet. 21a). The petition for certiorari, however, was not filed until August 20, 1960, which is more than ninety days after May 4. Nor is a different conclusion required by the fact that a decree was entered on May 23 (Pet. 22a-23a). The decree did not revise legal rights and obligations, but was merely a ministerial formalization of the decision of April 20, which was confirmed by the denial of rehearing on May 4. Accordingly, it appears that the original judgment entered on April 6 was the final order understood by the court as its disposition of the issues before it, and that the denial of the motion for rehearing on May 4 fixed the time for the filing of the petition for a writ of certiorari. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227; *United States* v. *Hark*, 320 U.S. 531; *Commissioner* v. *Estate of Bedford*, 325 U.S. 283. Had the determination of the contents of the subsequent decree required the resolution of additional issues, it would seem that the time to review such action might be

held to run from the date of the decree, but that period would not apply to issues finally settled by the earlier judgment. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

2. In any event, the Board's unit determination was manifestly within its powers under the Act and thus presents no issue warranting review by this Court. Section 9(b) of the Act vests the Board with wide discretion to determine whether the appropriate unit shall be "the employer unit, craft unit, plant unit, or subdivision thereof." In the light of the facts concerning the offset department and its employees—set forth in the Statement (pp. 3-4, *supra*) and analyzed in the opinion of the court below (Pet. 6a-8a)—ample basis existed for the Board's conclusion that a separate unit of lithographers was appropriate for bargaining purposes and that the employees in that unit should consequently be afforded an opportunity to determine whether they desired separate representation.[2]

There is no substance to the petitioner's contention (Pet. 6-14) that the Board failed adequately to articulate the grounds for its determination. A fair reading of the Board's decision (B.A. 92) shows, as the court below had no difficulty in recognizing, that it rests on the ample record facts just mentioned—namely, that the employees in the offset department were utilizing the traditional skills of lithographers, the craft status of which the Board had frequently recognized in past

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[2] *See May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380; *National Labor Relations Board* v. *Morgantown Full Fashioned Hosiery Co.*, 241 F. 2d 913 (C.A. 4); *Harris Langenberg Hat Co.* v. *National Labor Relations Board*, 216 F. 2d 146, 147-148 (C.A. 8); *National Labor Relations Board* v. *Stanolind Oil & Gas Co.*, 208 F. 2d 239, 242 (C.A. 10).

cases (see Pet. 8a); that the union seeking to represent the offset employees was a traditional representative of lithographic employees; that there was little interchange of employees between the offset department and the rest of the plant; and that the plant was not so highly integrated as to render a separate craft unit inappropriate.

Nor is the petitioner aided by its effort (Pet. 7-10, 15-17) to interject the Board's *American Potash* decision, 107 NLRB 1418, into this case. In *American Potash* the Board declared that, except in the four industries where it had already been applied, it would no longer adhere to the principle[3] of declining to permit a craft unit to be severed from a larger unit where the operation was highly integrated and there had been a prior history of bargaining on an industrial basis; instead, it would permit severance even where those factors existed, if the group sought to be severed was a true craft group or its equivalent[4] and the union seeking to represent it separately was a traditional representative of employees exercising those skills. In *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, certiorari denied, 361 U.S.

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[3] Enunciated in *National Tube Co.*, 76 NLRB 1199.

[4] Contrary to the petitioner's assertion (Pet. 7-8), the Board, although primarily concerned with a group of employees exercising true craft skills, did not confine its decision in *American Potash* to those kinds of employees. It went on to add, after the passage quoted by the petitioner, that: "[W]e also recognize that the equities of employees in certain other minority groups, though lacking the hallmark of craft skill, may also require that they be treated as severable units. Many employers have functionally distinct departments containing employees identified with traditional trades or occupations distinct from that of other employees and who have common special interest in collective bargaining for that reason" (107 NLRB at 1424).

943, the Fourth Circuit held that the *American Potash* criteria were arbitrary, as applied to the plate glass industry, in ignoring the highly integrated nature of operations in that industry and its long history of bargaining on an industrial basis. However, as the court below properly noted (Pet. 8a-9a), it is not necessary in this case to pass on the validity of the *American Potash* criteria, or the correctness of the Fourth Circuit's rejection thereof in *Pittsburgh Plate Glass*. For both of those cases "involved industries *found to be integrated* and set applicable standards for severing a craft unit within such industries . . . . Here, the key finding of the Board, for which there is substantial support, *supra*, is that [the Company's] plant is *not* integrated" (Pet. 9a). In other words, even if the Board may not establish a craft unit merely on the basis that the group involved exercises distinctive skills and is sought to be represented by a union specializing in the problems of that group, where there are other relevant factors like integration of operations to consider, it does not follow that the former factors are an insufficient basis for a craft unit where, as here, no other relevant factors are present. See *National Labor Relations Board* v. *Libby-Owens Ford*, 241 F. 2d 831 (C.A. 4), and cases cited n. 2, *supra*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MELVIN J. WELLES,
MORTON NAMROW,
Attorneys,
National Labor Relations Board.

September 1960.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Wednesday, April 6, 1960

BEFORE

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*

No. 12793

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
WEYERHAEUSER COMPANY, a Corporation, as successor to the Act Folding Box Corporation, *Respondent*.

Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order entered July 10, 1959, respondent's answer to said petition, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for a decree enforcing its order be granted, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:
s/ KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960—564825/P. O. 812

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SUPREME COURT, U.S.
FILED
SEP 30 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 349

WEYERHAEUSER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR WEYERHAEUSER COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR WEYERHAEUSER COMPANY

In its brief opposing our Petition for a Writ of Certiorari, the National Labor Relations Board has raised the contention that the Petition was untimely. It relies upon three cases,[1] in all of which a petition or appeal was held timely when based upon a formal order which was entered later than the date of the court's opinion. These cases themselves establish the lack of merit in the Board's contention, and we shall allude to this fact hereinafter.

[1] *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227; *United States* v. *Hark*, 320 U.S. 531; *Commissioner* v. *Estate of Bedford*, 325 U.S. 283.

The rules of the Court of Appeals for the Seventh Circuit specifically deal with judgments in proceedings involving the enforcement of administrative orders. Rule 23 of that court reads in part as follows:

> . . . In all cases *except that of a decree enforcing the order of an administrative tribunal*, judgment shall be entered on the date the opinion is filed. (See Rule 14(1) for decrees in reviews of administrative tribunals.) [Emphasis supplied.]

Rule 14(1) reads as follows:

> (1) Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed, directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument.

The Board itself, by its conduct, clearly evidenced that it was aware of Rule 14(1) and was proceeding in accordance with it. It filed a "proposed decree" with the clerk on April 18, 1960, and certified to the court its service upon Petitioner. (Appendix 1a and 2a.) By the court's rule, Weyerhaeuser Company had five days to object to the entry of the decree. Petitioner asked the court for a rehearing on April 21, 1960, and the Board's proposed decree was therefore not entered until May 23, 1960. The Board now apparently contends that the proposed decree, submitted

by it to the court below and subject to objection by the Petitioner, was a gratuitous afterthought and not the customary and expectable final act of the court. This inconsistent position is similar to the one which this Court considered as a factor in holding, in *U.S.* v. *Schaefer Brewing Co.*, 356 U.S. 227 (*supra* f.n. 1), that an appeal to the Court of Appeals for the Second Circuit was timely under the provisions of the Federal Rules of Civil Procedure.

The Board further asserts that the entry of this formal decree was purely a ministeral act. This argument ignores the opportunity given to the Petitioner by rule to object to the entry of decree. It further ignores the cases upon which the Board itself relies. The final order in *Commissioner* v. *Estate of Redford*, 325 U.S. 283 (*supra*, f.n. 1) was an order signed by the clerk, not the judges, merely formalizing the prior decision of the court, and this Court specifically noted that the clerk was performing a ministerial act according to the court's standing instructions. It was nevertheless held to be the final act from which the appeal time began to run.

As the three cases also show, the date of the judgment or decree is dependent in large measure upon whether the order clearly evidenced the intention of the court that it should be its final act. Formal judgment, as was entered in the case at bar on May 23, 1960, is *prima facie* the decision or judgment of the court. As stated in *United States* v. *Hark*, 320 U.S. 531 (*supra*, f.n. 1), at page 535:

> The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as

in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

The understanding of the court below is clearly evidenced by the court rules and by its entering of the signed decree of May 23, 1960. The understanding of the Clerk of the Court of Appeals for the Seventh Circuit is evidenced by the fact that the document set forth by the Board in its appendix was not included as part of the certified record of the proceedings in the court below.[2] The understanding of Petitioner is evidenced by the fact that it petitioned from the decree of May 23, 1960.

Petitioner need not, however, depend upon this *prima facie* showing, nor need it depend upon local practice, as was the case in *Commissioner* v. *Estate of Bedford*, 325 U.S. 283 (1945). The Court of Appeals' rule is perfectly clear on the question, and the unsigned order of April 6, 1960, upon which the Board now relies, was of no significance whatsoever in fixing the date for an appeal.

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[2] The Clerk of the Court of Appeals stated, in response to our inquiry, that it is his practice not to include such a document in the certified record of an enforcement case, since he does not consider it the final order of the court. Petitioner further understands that this document was certified to the court only on specific request of the Board, having been omitted from the original certified record for the foregoing reason. Petitioner never received a copy of it and was not aware of its existence until receiving the Board's brief in opposition to a writ of certiorari.

CONCLUSION

The form of the decree of May 23, 1960, the court's rules, and the understanding of the parties as evidenced by their conduct clearly establish that the decree of May 23, 1960, was, and was intended to be, the final act of the court. The raising of an issue so clearly without merit suggests that the Board does not wish to meet the merits of our Petition for a Writ of Certiorari. Further, its reliance upon its view of the testimony in the record, in preference to meeting the issue raised by the Petitioner respecting the sufficiency of the administrative decision, further supports Petitioner's position that this Court should review the sufficiency of the administrative proceedings in the case at bar.

Respectfully submitted,

THOMAS R. MCMILLEN
135 South La Salle Street
Chicago 3, Illinois

JAMES B. MORAN
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Chicago 3, Illinois

APPENDIX

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington 25, D. C.

April 14, 1960

Kenneth J. Carrick, *Esquire*
Clerk, United States Court of
Appeals for the Seventh Circuit
1212 Lake Shore Drive
Chicago, Illinois

Re: No. 12793—N.L.R.B. v. Weyerhaeuser Company, a corporation as successor to Ace Folding Box Corp.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court, we would appreciate your returning one certified copy thereof to this office.

Certificate of service is also enclosed.

Very truly yours,
Stuart Rothman
General Counsel

By s Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel

cc & dcc. to:

Messrs. Bell, Boyd, Marshall & Lloyd
Att.: Thomas R. McMillan, Esquire
135 South La Salle Street
Chicago 3, Illinois

Benjamin M. Robinson, Esquire
230 Park Avenue
New York 17, New York

Stamped "Received in Clerk's Office Apr 18 1960" U.S.C.A.—7th Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEYERHAEUSER COMPANY, a corporation,
as successor to ACE FOLDING BOX CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of proposed decree in the above case was this day served by first class mail upon the following counsel at the addresses listed below:

Messrs. Bell, Boyd, Marshall & Lloyd
Att.: Thomas R. McMillan, Esquire
135 South La Salle Street
Chicago 3, Illinois

Benjamin M. Robinson, Esquire
230 Park Avenue
New York 17, New York

By /s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 14th day of April, 1960

[Stamped "Received in Clerk's Office Apr 18 1960", U.S.C.A.—7th Circuit]